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In the
Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1304

CHARLES B. BRADLEY, JR.,
BYRON H. JOHNSON,
ROBERT T. ODELL, JR., and
WILLIAM JAMES HELLIESEN,
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE PETITIONERS

Opinion Below

The opinion of the Court of Appeals (App. 19; Pet. for Writ of Cert. 11-15) is reported at 455 F.2d 1181, 1189 (on motion for order vacating sentences and for remand).

Jurisdiction

The final order of the Court of Appeals was entered March 10, 1972. (App. 20) The petition was filed April 10, 1972, and was granted June 12, 1972. The jurisdiction of this Court rests on 28 U.S.C. §1254(1).

Statutory Provisions Involved

1 U.S.C. §109, 61 Stat. 633

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability.
>
> ....

18 U.S.C. §3651, 62 Stat. 842, as amended

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> • • •

18 U.S.C. §4202, 62 Stat. 854, as amended

> A federal prisoner, other than a juvenile delinquent or a committed youth offender, wherever confined and

serving a definite term or terms of over one hundred and eighty days, whose record shows that he has observed the rules of the institution in which he is confined, may be released on parole after serving one-third of such term or terms or after serving fifteen years of a life sentence or of a sentence of over forty-five years.

26 U.S.C. §4705(a), 68A Stat. 551

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate. (repealed, effective May 1, 1971. §§1101(b)(3)(A), Pub. L. 91-513, 84 Stat. 1292; §1105(a), Pub. L. 91-513)

26 U.S.C. §7237, 70 Stat. 568

(b) Whoever ... conspires to commit an offense, described in section 4705(a) ... shall be imprisoned not less than 5 or more than 20 years and, in addition, may be fined not more than $20,000 ....

* * *

(d) Upon conviction —

(1) of any offense the penalty for which is provided in subsection (b) of this section ...

the imposition or execution of sentence shall not be suspended, probation shall not be granted and in the case of a violation of a law relating to narcotic drugs, section 4202 of title 18, United States Code, and the Act of July 15, 1932 (47 Stat. 696; D.C. Code 24-201 and following), as amended, shall not apply. (repealed, effective May 1, 1971, §1101(b)(4)(A), Pub. L. 91-513, 84 Stat. 1292, §1105(a), Pub. L. 91-513)

Pub. L. 91-513, 84 Stat. 1236 *et seq.*

§1101, 84 Stat. 1292.

(b)(3)(A) Subchapter A of chapter 39 of the Internal Revenue Code of 1954 (relating to narcotic drugs and marihuana) is repealed.

(b)(4)(A) Section [ ] 7237 (relating to violation of laws relating to narcotic drugs and marihuana) ... of the Internal Revenue Code of 1954 are [is] repealed.

* * *

§1103(a)

Prosecutions for any violation of law occurring prior to the effective date of section 1101 shall not be affected by the repeals or amendments made by such section ..., or abated by reason thereof.

§1105(a)

Except as otherwise provided in this section, this title shall become effective on the first day of the seventh calendar month that begins after the day immediately preceding the date of enactment.

Questions Presented

Judgments of conviction were entered against petitioners on June 2, 1971 following guilty verdict by a jury on May 6, 1971, of conspiracy, prior to May 1, 1971, to violate 26 U.S.C. §§4705(a) and 7237(b), five days following the effective date of repeal (by §1101(b)(4)(A) of Pub. L. 91-513, 84 Stat. 1236) of 26 U.S.C. §7237(d), prohibiting suspension of sentence, grant of probation, or grant of parole to violators of 26 U.S.C. §4705(a). The questions presented are:

1. Whether the sentencing alternatives of suspension of sentence and probation otherwise available to the trial judge under 18 U.S.C. §3651 were made unavailable by §1103(a) of Pub. L. 91-513, 84 Stat. 1236 or by 1 U.S.C. §109.

2. Whether the judgments of convictions of conspiracy to violate 26 U.S.C. §§4705(a) and 7237(b) preclude application of 18 U.S.C. §4202 to grant petitioners release on parole during their confinement, if any.

Statement of the Case

This Court has granted certiorari to the United States Court of Appeals for the First Circuit to review an order entered March 10, 1972, (App. 20) denying petitioners' joint motion for order vacating sentences and for remand and for stay of mandate pending a resentencing, in accordance with the Court's opinion of March 10, 1972, (App. 11-15; Pet. for Writ of Cert. 11-15; *United States* v. *Bradley*, 455 F.2d 1181 (1 Cir., 1972)) which affirmed the sentences as "legally imposed".)

At the outset of trial, counsel for Johnson, speaking on behalf of all counsel, indicated petitioners' concern with the effect of repeal of 26 U.S.C. §7237. (App. 11)

Petitioners were sentenced to five years imprisonment each (App. 5-11) following a jury finding of guilty as to each defendant of conspiracy to violate 26 U.S.C. §4705(a) by selling cocaine not in pursuance of a written order form, in violation of 26 U.S.C. §7237(b). (App. 2-4) Petitioners Bradley and Johnson were also charged with substantive violations of 26 U.S.C. §4705(a) and acquitted and all petitioners other than Johnson were found guilty of violation of 18 U.S.C. §924(c)(2). The latter convictions, upon which each petitioner so convicted was sentenced to a suspended sentence of one year's imprisonment are not material to this petition.

The conspiracy for which petitioners were convicted was alleged to have taken place between March 4 and March 12, 1971, (App. 2-4) prior to May 1, 1971, the effective date of repeal by Pub. L. 91-513 of 26 U.S.C. §§4705(a) and 7237(b)

and (d), but the trial commenced with impanelment of a jury on May 3, 1971 and concluded with verdicts on May 6, 1971. (App. 1) Petitioners were thereafter sentenced on June 2, 1971.[1] (App. 5-11)

Following affirmance of the convictions on January 27, 1972, (App. 13) on February 7, 1972, petitioners filed in the district court motions for correction of an illegal sentence under Rule 35. (App. 2) The district court took no action upon the motions.

Petitioners thereupon filed joint motions with the court of appeals respectively for order vacating sentences and for remand and for stay of mandate. (App. 16-19)

The motion for vacation alleged that the sentences originally imposed by the district court were illegal in that the district court did not take into account "the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, P.L. 91-513, insofar as such Act provided the ... sentencing alternatives" of probation, suspension of sentence and parole, available as of May 1, 1971.

On March 10, 1972, the Court of Appeals entered the order previously referred to, denying petitioners' motion, (App. 20) with the accompanying opinion affirming the sentences. (App. 19; Pet. for Cert. 11-15) The court reached "the merits of [petitioners'] motion by considering it as an appendage to this appeal". (Pet. for Cert. 11)

Summary of Argument

I. If, as petitioners suggest, the later special saving clause, Pub. L. 91-513, §1103(a), conflicts with 1 U.S.C. §109, this Court need only deal with the question of application of §1103(a) to 26 U.S.C. §7237(d)(1). That question is dealt with in point II.

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[1] The opinion of March 10, 1972, is incorrect insofar as it states that May 1, 1972 was "five days prior to sentencing".

On the other hand, if there is no conflict between the general saving provision and the special saving provision, this Court, for reasons more fully stated in point IV, should treat the words "penalty, forfeiture, or liability" in 1 U.S.C. §109 as being comprehended within "prosecutions" as used in Pub. L. 91-513, §1103(a).

II. Although the word "prosecutions" in Pub. L. 91-513 certainly includes sentence, the exercise of the trial court's discretion to grant or not to grant probation or to suspend or not to suspend sentence, is not part of prosecution.

Final judgment means sentence, but probation and suspension of sentence may be granted between imposition of sentence and the time when actual service of sentence begins, demonstrating that these "acts of grace" may take place after the conclusion of the prosecution. Furthermore, the punitive aspects of sentence and the determination of factual issues involved prior to judgment, looking to the past, are quite different than the rehabilitative and reformative aspects of probation and suspension of sentence under 18 U.S.C. §3651, which look to the future.

The prohibitions in 26 U.S.C. §7237(d)(1) were repealed by §1101 of Pub. L. 91-513, since the repeal did not affect or abate the prosecution of petitioners.

III. This Court, in *Morrissey* v. *Brewer*, —— U.S. ——, ——, (1972), No. 71-5103, 70 U.S.L.W. 5016, 5018 (June 29, 1972), made it clear that parole arises after the end of criminal prosecution, including imposition of sentence. Parole, made inapplicable to certain narcotics offenses by 26 U.S.C. §7237(d) (1), repealed effective May 1, 1971, is available following May 1, 1971, since its repeal does not affect or abate prosecutions within the meaning of Pub. L. 91-513, §1103(a).

IV. If Pub. L. 91-513, §1103(a) did not conflict with the general saving statute, 1 U.S.C. §109, 1 U.S.C. §109 nevertheless does not save 26 U.S.C. §7237(d)(1).

Unless it is suggested that "penalty, forfeiture, or liability" is not part of the prosecution, which petitioners do not understand the Government to contend, even under the broadest interpretation of those words, since parole arises after the end of prosecution, including sentence, 1 U.S.C. §109 does not deal with parole and therefore does not save 26 U.S.C. §7237(d)(1). Parole does not change penalty or liability but is merely a variation upon imprisonment. Integrity of the law is nonetheless maintained, even though a prisoner convicted of an offense committed prior to May 1, 1971, and sentenced afterwards is later paroled. The prisoner has suffered the consequences of his conduct.

With respect to the effect of 1 U.S.C. §109 upon the no probation, no suspension of sentence provisions of 26 U.S.C. §7237(d)(1), this Court is requested to consider the arguments made under point II with respect to Pub. L. 91-513 as also applicable here.

However, the question as to 1 U.S.C. §109 involves examination of the meaning of "penalty, forfeiture, or liability".

None of the cases relied upon by the court below dealt with the question dealt with here, and petitioners do not question the correctness of holdings contained in such cases, *e.g.* that trial and sentence of an alleged offender against a repealed statute is saved by the general saving statute and that choice between several defined punishments, death, a life sentence or a term of years, is unavailable because of 1 U.S.C. §109 to a sentencing judge when prosecution is under a repealed statute providing only death or life imprisonment as punishment.

Under such cases "penalty" or "liability" refer to the specific punishment fixed by a statute. Such penalty or

liability may be made subject to the exercise of judicial discretion by probation legislation granting discretion independent of the discretion granted by statutes fixing specific terms of imprisonment or amounts of fines as sentence.

Neither the grant of probation nor the suspension of sentence releases or extinguishes a penalty, forfeiture or liability, nor is prosecution for the enforcement of a penalty, forfeiture or liability abated by repeal of 26 U.S.C. §7237(a)(1). Petitioners, therefore, were entitled to have the trial judge at sentencing consider, in addition to the appropriate minimum term of years of imprisonment under 26 U.S.C. §7237(1), whether to exercise his discretionary powers under 18 U.S.C. §3651.

Argument

I. If Pub. L. 91-513, §1103(a) Is In Conflict With 1 U.S.C. §109, The Provisions Of §1103(a) Control. If The Statutes Are Not In Conflict, The Words Of 1 U.S.C. §109 Should Be Read Consistently With Those Used In Pub. L. 91-513.

There are, we submit, two alternative approaches to the question as to the impact of 1 U.S.C. §109 and §1103(a) of Pub. L. 91-513 upon 26 U.S.C. §§4705(a), 7237(b) and 7237(a)(1).

If, as we suggest, §1103(a) "necessarily, or by clear implication, conflicts with the general rule declared in [1 U.S.C. §109[2]]. . . .", "the latest expression of legislative will [§1103(a)] must prevail." *Hertz* v. *Woodman*, 218 U.S. 205, 218 (1910). Whether there is such a conflict depends in turn on the question of whether the words

[2] 1 U.S.C. §109 is the successor to Rev. St. §13, dealt with in *Hertz* v. *Woodman*.

"penalty, forfeiture, or liability", as used in 1 U.S.C. §109 are treated as going beyond the incidents of "prosecutions", as that word is used in Pub. L. 91-513, §1103 (a).

We also, however, suggest in the alternative that the words "penalty, forfeiture, or liability", are comprehended within the word, "prosecutions", so that 1 U.S.C. §109 and Pub. L. 91-513 are not in conflict and may be read together.

In support of either interpretation, we would suggest that the enactment by the Congress of §1103(a) would be without purpose, if 1 U.S.C. §109 were to control its meaning.

In *Hertz* v. *Woodman*, 218 U.S. 205 (1910), an act had been partially repealed. Among those sections repealed was a section providing for the taxation of legacies. Among the sections not repealed was a section providing that the tax upon legacies should become due and payable in one year after the death of the testator. This Court addressed the question as to whether or not a saving clause directed specifically to taxes imposed under the first section saved the tax where the testator had died before the repeal but, under the second, did not become due and payable until afterwards.

This saving clause provided in material respects: "That all taxes or duties imposed by [the repealed statute] prior to the taking effect of this act, shall be subject as to lien, charge, collection, and otherwise, to the provisions of [a section of the repealed act providing that the tax or duty imposed should be due and payable in one year after the death of the testator], which are hereby continued in force, as follows . . ." This Court stated the question in the case to be "whether the tax in question had been 'imposed' prior to the going into effect of the re-

pealing act within the intent and effect of the saving clause just set out." (218 U.S., at 205) (single quotation marks added)

In its analysis of the repealed statute, the Court found that the tax was "imposed" upon the death of the testator and became a "liability" (see Rev. St. 13, 1 U.S.C. §109) at the same instant. Thus the "liability . . . was not relieved . . . as a consequence of the saving clause in the repealing act . . . ." 218 U.S., at 218. The Court therefore held that the tax "was saved by the saving clause of the repealing act." (218 U.S., at 205). The holding of the Court, therefore, was as we urge the holding in this case should be, that the terms of the saving clause contained in the repealing act controlled. The significance of Rev. St. §13 (now 1 U.S.C. §109) was that the saving clause in the repealed statute did not cut down the scope and operation of §13.

In *Great Northern Railway Co.* v. *United States*, 208 U.S. 452 (1908) the repealing act contained saving language as follows:

> "But the amendment herein provided for shall not affect causes now pending in courts of the United States, but such cases shall be prosecuted to a conclusion in the manner heretofore provided by law."

The Court considered the question as to whether these words "conflict[ed] with the general rule established by §13, Rev. Stat. . . . ." (208 U.S., at 466) and held that they did not, since they had only the effect of continuing in force prosecution procedures as to cases pending under the repealed statute, and that therefore the Government did not lose its right to prosecute for violations of the repealed statute.

Aside from the conclusion that the *Great Northern Rail-*

way Co. case goes no further than to hold, with which holding petitioners do not quarrel, that Rev. St. §13, now 1 U.S.C. §109, saves a prosecution which otherwise could not have been brought under a repealed statute, these two cases show (1) that a specific saving clause in an act repealing a statute which conflicts with the general saving clause destroys the effect of the general saving statute (*Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 466 (1908)), (2) that such a specific saving clause which "cuts down the scope and operation" of the general saving statute may relieve of liabilities which would otherwise be saved in the repealed statute by the general saving statute (*Herts* v. *Woodman*, 218 U.S. 205, 218 (1910)), (3) that where there is no conflict, but the question is as to the meaning of the special saving clause, the Court will base its holding on the special rather than the general clause, even though the general clause is treated "as a rule of construction (*Herts* v. *Woodman*, *supra*, 218 U.S., at 217, 244) and (4) that in a case where the special saving clause deals with remedies rather than substance, there is no conflict, and the general saving statute saves the substance of prosecutions. *Great Northern Railway Co.* v. *United States*, *supra*, 208 U.S., at 467-470.

We submit that if the words "penalty, forfeiture, or liability", as used in 1 U.S.C. §109, relate to incidents of an individual's involvement with the criminal law going beyond the incidents of "prosecutions" as used in §1103(a) of Pub. L. 91-513, (which proposition we do not concede, but include, should this Court differ with us) then the scope and operation of 1 U.S.C. §109 is plainly cut down so that this Court need not concern itself with the effect of 1 U.S.C. §109 upon petitioners' situation but only with the effect of §1103(a) of Pub. L. 91-513.

We further submit that, if 1 U.S.C. §109 and §1103(a) are treated as not in conflict, this Court should treat the

words "penalty, forfeiture, or liability" in 1 U.S.C. §109 as being contained within the word "prosecutions" as used in §1103(a) in order "that effect be given to all the parts of a law." *Great Northern Railway Co.* v. *United States*, 208 U.S. 452, 465 (1908). If from this point of view, the relationship of the two statutes appears to be ambiguous, the rule of construction is clear.

> "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity shall be resolved in favor of lenity. . . ." *Bell* v. *United States*, 349 U.S. 81, 83 (1965). *cf. Hamm* v. *City of Rock Hill*, 379 U.S. 306, 313 (1964).

II. Probation And The Suspension Of Sentence Are Not Part Of Sentence, Which Is Part Of "Prosecution", As The Word Is Used In §1103(a) Of Pub. L. 91-513, And 26 U.S.C. §7237(d)(1) Was Not Saved By §1103(a).

If petitioners are correct in their contention that §1103(a) of Pub. L. ~~0-513~~ 91-513 is an expression of legislative will which by its terms prevails over 1 U.S.C., §109,[3] the effect upon 26 U.S.C., §§4705(a), 7237(b) and 7237(d)(1) of §1103(a) and, in particular, whether §7237(d)(1) is saved by §1103(a) is the only question in this case.

One need not read §1103(a) of Pub. L. 91-513 to provide that "prosecution" excludes sentencing, the interpretation apparently placed on the holding in *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971) by the court below,

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[3] Petitioners do not concede that rejection of this contention is fatal to their ultimate contention that probation and suspended sentences are available to offenders against 26 U.S.C. §§4705(a) and 7237(b). As argued *infra* (pp. 21-25). 1 U.S.C. §109, even if applicable, notwithstanding the later passage of §1103(a), does not preclude these exercises of judicial discretion.

(*United States* v. *Bradley*, 455 F.2d 1181, 1191 (1 Cir., 1971)), by the Second Circuit, (*United States* v. *Ross*, —— F.2d ——, —— (2 Cir., 1972), Dkt. No. 72-1135, Slip Op. 3475, 3479 (June 13, 1972)), by the Third Circuit, (*United States* v. *Caldwell*, —— F.2d ——, (3 Cir., 1972) Dkt. No. 72-1200, Slip Op. 6, (July 5, 1972)) and by the Tenth Circuit, (*Page* v. *United States*, 459 F.2d 467, 468 (10 Cir., 1972)) to reach the conclusion that, although prosecution includes sentence, sentence does not automatically include the decision of the trial court as to whether to exercise its suspension of sentence and probation discretion under 18 U.S.C. §3651.

Chronologically, the probationary power and the power to suspend sentence continues from the time when sentence is imposed until execution of the sentence theretofore imposed commences. *Affronti* v. *United States*, 350 U.S. 79, 83 (1955); *United States* v. *Murray*, 275 U.S. 347, 356-358 (1928). "The court's authority [to suspend sentence and to place a defendant on probation] arises 'upon entering a judgment of conviction,' 18 U.S.C. §3651, and it terminates when the convicted defendant actually enters upon the service of his prison sentence ...." *United States* v. *Ellenbogen*, 390 F.2d 537, 541 (2 Cir., 1968).

Nevertheless, "[f]inal judgment means sentence". *Berman* v. *United States*, 302 U.S. 211, 212 (1937). Whether following sentence to a term of years or to a fine, or contemporaneously therewith, the considerations involved in exercise of the court's powers under 18 U.S.C. §3651 are quite different from those involved in prosecution. It is not an over-generalization to say that probation deals with future events not, as prosecution does, with past events, such as the determination of guilt, an examination of the defendant's background, and the appropriate penalty for the guilty offender. This is clear from the language of this Court.

"Probation is concerned with rehabilitation, not with the determination of guilt. It does not secure reconsideration of issues that have been determined or change the judgment that has been rendered. Probation or suspension of sentence 'comes as an act of grace to one convicted of a crime' .... The considerations it involves are entirely apart from any re-consideration of the merits of the litigation. Probation was designed 'to aid the rehabilitation of a penitent offender;' 'to take advantage of an opportunity for reformation which actual service of the suspended sentence might make less probable.'" *Berman* v. *United States*, 302 U.S. 211, 213 (1937).

The distinction between sentence, which petitioners contend ends, and is part of, the prosecution process, and the grant of probation and the suspension of sentence, which petitioners contend is not part of that process, is made clear in *Roberts* v. *United States*, 320 U.S. 264, 267 (1943), in which the Court discussed the position of the petitioner in that case:

"Neither probation nor suspension of execution rescind the judgment sentencing petitioner to imprisonment; the one merely ordered that petitioner be released under the supervision of probation officials, the other that enforcement of his sentence be postponed. Upon their revocation, without further court action, the original sentence remained for execution as though it had never been suspended."

That probation is not part of the sentence, and therefore not part of "prosecution" is evidenced by the holding in *Thomas* v. *United States*, 327 F.2d 795 (10 Cir., 1964),

that the period spent on probation is not counted as part of the term of imprisonment, when probation was revoked and the suspended sentence imposed. The Court said: "It [probation] is an act of grace to one convicted and is granted as a privilege, not as a right." And in *Burns* v. *United States*, 287 U.S. 216, 222 (1932), this Court pointed out that a probationer "is still a person convicted of an offense and the suspension of his sentence remains within the control of the court."

Following this reasoning, the Second Circuit states in a recent case that the original term, even though suspended, "informs [the probation judge] of what the trial judge thought an appropriate prison term would be." *United States* v. *Nagelberg*, 413 F.2d 708, 711 (2 Cir., 1969).

Thus, the length of the prison term imposed, even though suspended, measures the punishment for the offense, in the event a defendant does not "take advantage of [his] opportunity for reformation." *Berman* v. *United States*, 302 U.S. 211, 213 (1937).

The Ninth Circuit, in *United States* v. *Stephens*, 449 F.2d 103 (9 Cir., 1971), it is plain, did not intend in its holding (or in the language used by it, *id.*, at 105) to exclude sentence from "prosecution" for the purpose of §1103(a) of Pub. L. 91-513. This is made clear in the same court's later holding in *United States* v. *Fithian*, 452 F.2d 505, 506 (9 Cir., 1971) to the effect that the minimum term of imprisonment prescribed in 21 U.S.C. §176(a) was the sentence required to be imposed for an offense occurring prior to May 1, 1971. The distinction between a sentence "*under* 21 U.S.C. 176(a)" (*id.*) and probation is clarified by the court's explication of *Stephens* "that the new Act [Pub. L. 91-513] from its effective date had rendered probation available to offenses committed under §176(a)." *United States* v. *Fithian*, *supra*, at 506. *Accord*, *United States* v.

Rojas-Colombo, —— F.2d ——, —— (5 Cir., 1972), Dkt. No. 71-2438, Slip Op., 4, (June 23, 1972); *United States* v. *McGarr*, —— F.2d ——, —— (7 Cir., 1972), Dkt. No. 72-1108, Slip Op., 4-6, (April 28, 1972).[4]

Conceptually, then, sentence ("judgment", *Berman* v. *United States*, 302 U.S. 211, 212 (1937)) is separate from probation and suspension of execution of sentence. *Roberts* v. *United States*, 320 U.S. 264, 267 (1943). This conceptual separation is supported by the legality of their occasional chronological separation. *Affronti* v. *United States*, 350 U.S. 79, 83 (1955). This analysis demonstrates the underlying rationale in cases such as *United States* v. *McGarr*, —— F.2d ——, —— (7 Cir., 1972), Slip Op. at 6, for the proposition that "[t]he availability of these provisions [for probation and parole] in no way eliminates the penalty."

We submit that the prohibitions against suspension of sentence, grant of probation and parole contained in 26 U.S.C. §7237(a)(1) have been repealed by §1101 of Pub. L. 91-513, since such repeal did not affect prosecution of petitioners under 26 U.S.C. §§4705(a) and 7237(b) within the meaning of §1103(a) of Pub. L. 91-513.

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[4] "We believe defendants prosecuted under the old statute must necessarily *be sentenced* under the old statute." *id.*, at 4

* * * * * *

"[W]hen Congress does expressly repeal a statute, we should not read a savings clause so broadly that it encompasses much more than is necessary to achieve its general purpose — preventing the abatement of prosecutions which, at common law, would otherwise have resulted from the repeal of a statute or from the change in the definition of an offense.

"We therefore agree with the Ninth Circuit that the availability of probation under 18 U.S.C. §3651, or, for that matter, parole under 18 U.S.C. §4202 (both of which were unavailable by reason of 26 U.S.C. §7237(d)), *is not part of the penalty.*" *id.*, at 5 (emphasis added)

III. Since Parole Arises After The End Of Criminal Prosecution, §1103(a) Of Pub. L. 91-513 Does Not Save That Portion Of 26 U.S.C. §7237(d)(1) Making 18 U.S.C. §4202 Inapplicable To Certain Narcotics Prosecutions.

It is even clearer than in the case of the non-applicability of §1103(a) of Pub. L. 91-513 to the availability of probation, argued *supra* (pp. 13-17), that §1103(a) did not save that portion of 26 U.S.C. §7237(d)(1) providing "in the case of a violation of a law relating to narcotic drugs, section 4202 of Title 18, United States Code [relating to availability of parole] . . . shall not apply."

It bears repeating that §1103(a) provides that "prosecutions" for violations of law occurring prior to May 1, 1971, are not to be affected by the "repeals" made by §1101 of Pub. L. 91-513.

The statement of this Court as to the relationship of parole to prosecution is definitive and timely. On June 29, 1972, this Court, speaking through the Chief Justice, said: "Parole arises after the end of the criminal prosecution, including imposition of sentence." *Morrissey* v. *Brewer*, —— U.S. ——, —— (1972), No. 71-5103, 40 U.S.L.W. 5016, 5018 (June 29, 1972). The statement of the relationship is not dependent upon construction of a particular federal statute but is a generic definition of the institution of parole, arising as it does in the context of review of a state parole proceeding. *id.*, at 5016. It settles without question at least two issues in this case. (1) The imposition of sentence is included in "prosecution".[5] (2) Parole is in no sense part of a "criminal prosecution".

[5] See the discussion *supra* (pp. 16-17) of the misconceptions of the holding in *United States* v. *Stephens*, 449 F.2d 103, 105 (9 Cir., 1971) by the First, Second, Third and Tenth Circuits.

This is consistent with the framework of the federal parole statutes, which establish a Board of Parole in an executive department, (18 U.S.C. §4201, Pub. L. 80-645, 62 Stat. 854, as amended) apply to Federal prisoners already confined, (18 U.S.C. §4202) and give only to the executive board power both to grant and revoke parole. (18 U.S.C. §§4203, 4205, 4207) Only in the limited statutory area in which Congress has authorized sentencing courts either to fix a minimum parole eligibility term or to grant discretion to the Board of Parole to determine parole eligibility (18 U.S.C. §4208(a), Pub. L. 85-752, §3, 72 Stat. 845) are such courts at the time of sentencing involved in the parole process. 26 U.S.C. §7237(d)(1) does not, however, refer in its terms to 18 U.S.C. §4208(a).

That portion of 18 U.S.C. §7237(d)(1) providing that 18 U.S.C. §4202 "shall not apply" to offenses for which the penalty is provided in 26 U.S.C. §7237(b) was repealed effective May 1, 1971 (Pub. L. 91-513, §1105) by §1101 of Pub. L. 91-513, because, as stated by this Court, parole is not part of the "criminal prosecution". 18 U.S.C. §4202 does once again "apply", its non-applicability under 26 U.S.C. §7237(d)(1) not having been saved by §1103 of Pub. L. 91-513.

IV. If, Notwithstanding The Later Enactment Of Pub. L. 91-513, 1 U.S.C. §109 Nevertheless Remains Applicable To Prosecutions Under 26 U.S.C. §§4705(a) And 7237(b), It Does Not Save 26 U.S.C. §7237(d)(1), Since The Respective Executive And Judicial Powers With Respect To Parole, Suspension Of Sentence And Probation Do Not Fall Within The Meaning Of "Penalty, Forfeiture, Or Liability".

Petitioners have argued *supra* (pp. 9-12) that §1103(a) of Pub. L. 91-513 conflicts with the general rule of 1 U.S.C.

§109 and therefore 1 U.S.C. §109 need not be treated as applicable in any way. If petitioners are incorrect, they submit nevertheless that, for reasons closely analogous to the reasons for which §1103(a) did not save 26 U.S.C. §7237 (d)(1), 1 U.S.C. §109 similarly did not save §7237(d)(1) from repeal.

1. *Parole*

As a matter of statutory interpretation the issue as to the relationship of 1 U.S.C. §109 to that portion of 26 U.S.C. §7237(d)(1) rendering 18 U.S.C. §4202 inapplicable to offenses referred to in 26 U.S.C. §7237(b) is, following the reasoning of this Court in *Morrissey* v. *Brewer*, —— U.S. ——, —— (1972), No. 71-5103, 41 U.S.L.W. 5016 (June 29, 1972), easily clarified. "Parole arises after the end of the criminal prosecution, including imposition of sentence." 41 U.S.L.W., at 5018. Even under the broadest interpretation of 1 U.S.C. §109, (*Compare United States* v. *McGarr*, —— F.2d ——, —— (7 Cir., 1972) Dkt. No. 72-1108, Slip Op., at 5 (April 28, 1972); *United States* v. *Stephens*, 449 F.2d 103, 106 (9 Cir., 1971)) if "parole arises after the end of the criminal prosecution, including imposition of sentence", the inapplicability of 18 U.S.C. §4202 is not a part of the "penalty . . . , or liability incurred under" 26 U.S.C. §4705 (a) or under 26 U.S.C. §7237(b). "[T]he question of parole is by the statute made a matter entirely for the judgment and discretion of the Board of Parole. 54 Stat. 243; 18 U.S.C. §4203. The courts are without any power to grant a parole." *Cagle* v. *Harris*, 349 F.2d 404, 404-405 (8 Cir., 1965).

As this Court said: "The essence of parole is release from prison, before the completion of sentence, on the condition that the prisoner abide by certain rules during the balance of the sentence". *Morrissey* v. *Brewer*, —— U.S.

——, —— (1972), No. 71-5103, 40 U.S.L.W. 5016, 5018 (June 29, 1972). Thus, parole does not change the penalty or liability. It merely "is an established variation on imprisonment of convicted criminals." 40 U.S.L.W., at 5017. The Government's prosecution has been sustained in the case of a defendant who, following his sentence, becomes at some point eligible for parole, and the Government's freedom "to maintain the integrity of the law by insisting that those who violate it suffer the consequences" (*United States* v. *United States Coin and Currency*, 401 U.S. 715, 738-739 (1971), Burger, C.J., dissenting) has in no way been impaired.[6]

In summary, 1 U.S.C. §109 does not save from repeal that portion of 26 U.S.C. §7237(d)(2) making the provisions of 18 U.S.C. §4202 inapplicable to defendants convicted and sentenced under 26 U.S.C. §§4705(a) and 7237(b).

2. *Probation and Suspension of Sentence*

The considerations involved in an analysis of the effect of 1 U.S.C. §109 on the availability to the trial judge of suspension of sentence and probation under 18 U.S.C. §3651 with respect to petitioners are in large part the same as those involved in analysis (as *supra* pp. 13-17) of the relationship between §1103(a) of Pub. L. 91-513 and the same subjects.

Thus, "such statute [the repealed statute] shall be treated

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[6] Although petitioners were sentenced on June 2, 1971, (App. 5, 7, 8, 10) following May 1, 1971, the effective date of repeal of 26 U.S.C. §7237(d)(2), by P.L. 91-513, §§1101 and 1105(a), a broader question is presented with respect to those sentenced prior to May 1, 1971, who, now that the "non-applicability" provision of 26 U.S.C. §7237(d)(2) has been repealed, may be equally eligible for parole to those sentenced subsequent thereto. Petitioners, since not affected, take no position in the question as to whether 18 U.S.C. §4202 now equally applies to such individuals.

as remaining in force for the purpose of sustaining any proper action or *prosecution* for the enforcement of such penalty, forfeiture or liability . . . ." 1 U.S.C. §109 (emphasis added) The same questions as to the meaning of "prosecution" are present. We therefore respectfully request this Court to consider here the arguments made *supra* with respect to the effect of the capacity of the sentencing court to suspend sentence and grant probation between the time of sentencing and the actual commencement of service of sentence (p. 14) and the different considerations involved in the assessment of the length of term of imprisonment or amount of fine on the one hand and in the exercise of discretion to suspend sentences and grant probation, on the other. (pp. 14-16) *See Berman* v. *United States,* 302 U.S. 211, 213 (1937); *Roberts* v. *United States,* 320 U.S. 264, 267 (1943).

However, the question as to whether the repeal of 26 U.S.C. §7237(d)(1) releases or extinguishes a penalty, forfeiture or liability incurred under 26 U.S.C. §§4705(a) and 7237(b) and whether the provisions of §7237(d)(1) are within the meaning of "any penalty, forfeiture, or liability" which prosecution under §§4705(a) and 7237(b) enforces, are questions which, because of the difference in wording, are beyond the analysis of §1103(a) of Pub. L. 91-513 heretofore argued.

The reliance of the court below upon *United States* v. *Reisinger,* 128 U.S. 398, 402 (1888) is inapt here. See *United States* v. *Bradley,* 455 F.2d 1181, 1190 (1 Cir., 1971). The holding in Reisinger was a holding with which petitioners do not take issue, that is, that, by reason of Rev. St. §13, the predecessor of 1 U.S.C. §109, a defendant prosecuted under a repealed statute for conduct prior to the effective date of repeal could be convicted and punished for such conduct according to the penalties contained in the statute.

No question as to availability of suspension of imposition or execution of sentence or of probation was raised.[7]

Similarly, in *Great Northern Railway Co.* v. *United States*, 208 U.S. 452 (1908), the only question was whether repeal of the statute under which the defendant was indicted prevented prosecution for alleged conduct defined as an offense in the repealed statute.

And in *Lovely* v. *United States*, 175 F.2d 312 (4 Cir., 1949), also relied upon by the court below, (455 F.2d, at 1190, fn. 1) the holding was that 1 U.S.C. §109 prevented the trial judge from exercising a broader statutory discretion to choose among several penalties, including imprisonment for a term of years, set forth in the new statute, and limited him to the choice between sentences of death or life imprisonment set forth in the prior statute. Petitioners, unlike the defendant in *Lovely*, do not contend that the penalties specifically set forth in the repealed statute (in this case 26 U.S.C. §7237(b)) do not apply to them.

Petitioners in this case have not urged and do not now urge, as did the defendant in *United States* v. *Reisinger*, 128 U.S. 398, 400 (1888), "that the statute creating the offense set forth in the indictment, and fixing the punishment therefor, had been repealed, without saving the right to the United States to prosecute for offenses committed in violation of said act prior to the repeal of the same." (App. 3, 16-17, 18)

The "penalty" (*Ex Parte United States*, 242 U.S. 27, 52 (1916)) or "liability" (*Lovely* v. *United States*, 175 F.2d 312, 316-317 (4 Cir., 1949)) referred to in 1 U.S.C. §109 is in this case the term of years of imprisonment and fine set

[7] At the time *Reisinger* was decided, many (but not all) trial courts through the years had exercised a non-statutory power to suspend sentences, but probation was not available until passage in 1925 of the Probation Act, 43 Stat. 1259, c. 521. *United States* v. *Murray*, 275 U.S. 347, 352, 357 (1927). See *Ex Parte United States*, 242 U.S. 27 (1916).

forth in 26 U.S.C. §7237(b), which are not released or extinguished by repeal. The prosecution under the indictment (App. 2-3) enforced these penalties and liabilities by making petitioners subject to punishment thereunder pursuant to "the plain legislative command [in 26 U.S.C. §7237 (b)] fixing a specific punishment for crime ...." *Ex Parte United States*, 242 U.S. 27, 42 (1916). That the Congress, by "causing of the imposition of *penalties as fixed* to be subject, by probation legislation ... to such judicial discretion as may be adequate to enable courts to meet, by the exercise of an enlarged but wise discretion, the infinite variations which may be presented to them for judgment" (*id.*, at 42, emphasis added) does not show an intention upon the part of the Congress to bring the exercise or non-exercise of that discretion within the words "penalty, forfeiture, or liability" as used in 1 U.S.C. §109. It is by the judgment, pursuant to their prosecution, sentencing persons in the position of these petitioners to imprisonment, regardless of whether discretion is exercised to suspend the sentence and grant probation, that the "penalty, forfeiture or liability" fixed by 26 U.S.C. §7237(b) is enforced. *See Roberts* v. *United States*, 320 U.S. 264, 267 (1943). The prosecution, which is "but an application or enforcement of the law", (*United States* v. *Chambers*, 291 U.S. 217, 226 (1934)) is no less sustained because a sentence is suspended and probation granted. The reasons for 1 U.S.C. §109 are not in that case undercut. *cf. United States* v. *United States Coin and Currency*, 401 U.S. 715, 739 (1971) (dissenting opinion, Burger, C.J.).

Since the grant of probation or the suspension of sentence will not release or extinguish any penalty, forfeiture, or liability, 1 U.S.C. §109 does not save 26 U.S.C. §7237(d)(1), insofar as 18 U.S.C. §3651 makes probation or suspension of sentence available. For the same reasons, no prosecution for the enforcement of a penalty, forfeiture or liability is

abated by repeal of §7237(d)(1), which is therefore not required to be kept in force by 1 U.S.C. §109. Petitioners were therefore entitled, on June 2, 1971, (App. 5-11) to have the trial judge consider not only the appropriate confinement sentence within the upper and lower ranges provided by 26 U.S.C. §7237(b), but also whether or not to exercise his discretion under 18 U.S.C. §3651 to grant probation and to suspend execution of such sentences.

Conclusion

For the reasons hereinbefore stated it is respectfully submitted that the order of the court below dated March 10, 1972, denying petitioners' motion for order vacating sentences and for remand be vacated and that this case be remanded to the court below with an order that further proceedings with respect to petitioners are to be subject to 18 U.S.C. §§3651 and 4202.

Respectfully submitted,

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